

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2006 OCT 18 PM 1:19

IN THE MATTERS OF:)

Kerr-McGee Oil & Gas Onshore, LP)

DINSDALE 1-3 facility)

KOESTER 13, 14, 23-33 facility)

PEPPLER 3-36 facility)

Respondent.)

Docket Nos. CWA-08-2006-0041

CWA-08-2006-0042

CWA-08-2006-0043

FILED
EPA REGION VIII
HEARING CLERK

**ORDER REGARDING EXPEDITED SETTLEMENTS
AND FINAL ORDER**

On September 22, 2006, three Expedited Consent Agreements ("CA") were submitted by the parties to the Presiding Officer for approval pursuant to 40 C.F.R. § 22.18. Kerr-McGee Oil & Gas Onshore, LP is the Respondent in all three CAs. U.S. EPA ("Complainant" or "Agency") alleges violations occurred at three separate locations owned by Respondent: two facilities in Weld County, Colorado and one facility in Stark County, North Dakota. The alleged violations in all three CAs consist of failure to comply with the oil pollution prevention (SPCC) regulations promulgated under 33 U.S.C. §1321(j) and/or discharges of oil into or upon navigable waters and adjoining shorelines of the United States in quantities that have been determined may be harmful to the public health, welfare or environment pursuant to 33 U.S.C. §1321(b)(3) and (b)(6) of the Clean Water Act. The parties requested the Presiding Officer to sign a Final Order for each of the three CAs ratifying the parties' agreements.

On September 29, 2006, I issued an Order to Show Cause requiring additional information on the applicability of U.S. EPA policy, "Use of Expedited Settlements to Support Appropriate Tool Selection," dated December 2, 2003 ("Expedited Settlement Policy") to settle the three CAs. Specifically, I requested information on the date each CA was sent and received, whether any extensions of time were requested and/or granted and the parties' position on why the Expedited Settlement Policy is appropriate in these cases. The parties' responses were due and received by October 13, 2006.

Complainant's response provided the dates, August 21-23, 2006, that the CAs were sent to the Respondent. Respondent received the CAs within two days of each CA being sent. Respondent also stated in its response that the CAs were signed and returned within the 30 day time period identified in the CAs. With respect to the timeframe for signing the CAs, the parties have complied with the Expedited Settlement Policy.

Both parties also set forth their position on the "repeat violator" condition of the Expedited Settlement Policy in their responses. Respondent provided information relating to each of the three spills to show that they were dissimilar and unrelated. Respondent also provided information to show that the SPCC plans were prepared before Respondent acquired the sites. Respondent stated that it believed, in good faith, the SPCC plans met all the regulatory requirements when the sites were acquired from other companies. Most importantly, Respondent stated it "took appropriate corrective action long before it received the CAs from EPA." Resp.'s Resp. p. 2.

Complainant, on the other hand, addressed the notice component of the repeat violator provision. Complainant stated that all three CAs were, in effect, received at the same time between August 23-25, 2006. Complainant argues "while they are separate offers received on separate days, the fact that they were all sent and received within a three-day period constitutes, for the purposes of assessing notice, a single act." Compl.'s Resp. p. 3. Last, Complainant points out that the implied rationale for the notice provision in the Expedited Settlement Policy is to allow the facility "a chance to correct violations and mend their ways prior to ramping up the enforcement response." Compl.'s Resp. p. 3. Since Respondent had already corrected the violations before it received the CAs, and received notice essentially in one single act for all three violations, the need for additional notice is not necessary. The Expedited Settlement Policy notice provision has been met. The repeat violator question then becomes moot.

After careful review of the responses by the parties, I can now make an informed decision regarding approval of the three CAs. Respondent entered into these CAs in good faith believing that the Agency had authority to enter into the agreements. Complainant has authority to enter into the CAs as long as the penalty is appropriately based on the CWA statutory factors set forth at 33 U.S.C. § 1321(b)(8). See, *In Re Crown Central Petroleum Corp.*, Docket No. CWA-08-2000-06, (ALJ Gunning Jan. 8, 2002) at 56. (Section 311(b)(8) of the CWA sets forth various factors that the EPA and the Administrative Law Judge ("ALJ") must consider in determining the appropriate amount of civil penalty under section 311(b)(6)(B)(ii)). The Agency, at its discretion, can use the Expedited Settlement Policy to resolve such violations as long as the statutory requirements are met. Complainant chose to rely on the Expedited Settlement Policy and this Presiding Officer assumes that the statutory factors set forth at 33 U.S.C. § 1321(b)(8) were evaluated by the Agency in the three cases before this Tribunal. While using the Expedited Settlement Policy is discretionary, Complainant should ensure that it is following the conditions of the policy in moving forward. Given Respondent's reasonable reliance on entering into the agreements and Complainant's compliance with the policy's notice provision, albeit novel, in this instance, the Expedited Settlement Policy conditions were met.

Complainant's use of the Expedited Settlement Policy, in the manner it was used to resolve these three CAs before me, is not a prudent course of action for the future. Complainant seems to argue that the Expedited Settlement Policy allows for multiple

expedited consent agreements with the same party on any given violation within the five years from when notice was given. Compl. Resp. p. 3. This Presiding Officer does not interpret the Expedited Settlement Policy in the same way. The Expedited Settlement Policy states, "[t]raditional enforcement actions should be pursued for all violations where an expedited settlement is not adequate to address the level of noncompliance or the nature of the violator." (See, p. 2 and 10 of Expedited Settlement Policy). The statutory factors set forth at 33 U.S.C. § 1321(b)(8), arguably, suggest that expedited settlements are not appropriate in this scenario. Neither Complainant nor Respondent should have any expectation that this Tribunal will approve any further expedited settlement agreements pursuant to the Expedited Settlement Policy for violations of 33 U.S.C. § 1321(b)(3), and (j) of the Clean Water Act.

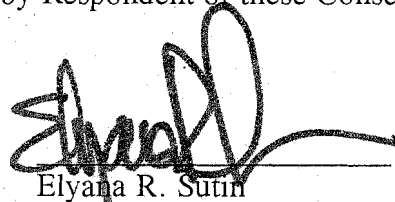
Accordingly, the three Consent Agreements for the Dinsdale 1-3 facility, the Koester13, 14, 22-33 facility and the Peppler 3-36 facility are **APPROVED**.

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18, the Consent Agreements resolving these matters are hereby approved and incorporated by reference into this Final Order. The Respondent is hereby ORDERED to comply with all the terms of the Consent Agreements, effective immediately upon receipt by Respondent of these Consent Agreements and Final Order.

10.18.06

DATE



Elyana R. Sutin

Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER REGARDING EXPEDITED SETTLEMENTS AND FINAL ORDER** in the matter **KERR-MCGEE OIL & GAS ONSHORE LP., DINSDALE 1-3 FACILITY, KOESTER 13, 14, 23-33 FACILITY and PEPPLER 3-36 FACILITY, DOCKET NOs.: CWA-08-2006-0041, 42 and 43** was filed with the Regional Hearing Clerk on October 18, 2006.

Further, the undersigned certifies that a true and correct copy of the document was delivered to David Janik, Enforcement Attorney, U. S. EPA – Region 8, 999 18th Street, Suite 300, Denver, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on October 18, 2006, to:

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October 18, 2006


Tina Artemis
Regional Hearing Clerk



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